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PATENT
Customer No. 22,852
Attorney Docket No. 5725.0875-00

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:)
)
Alaine BETHUNE et al.) Group Art Unit: 1775
)
Application No.: 09/824,244)
) Examiner: A. Sperty
Filed: April 3, 2001)
)
For: OBJECT HAVING A)
)
) DECORATIVE PATTERN AND
)
) METHOD OF APPLYING THE
)
) DECORATIVE PATTERN)

Mail Stop Appeal Brief--Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

TRANSMITTAL OF APPEAL BRIEF (37 C.F.R. 41.37)

Transmitted herewith is the APPEAL BRIEF in this application with respect to the
Notice of Appeal filed on September 2, 2004.

This application is on behalf of

☐ Small Entity ☒ Large Entity

Pursuant to 37 C.F.R. 41.20(b)(2), the fee for filing the Appeal Brief is:

☐ \$170.00 (Small Entity)

☒ \$340.00 (Large Entity)

☒ Enclosed is a check for \$340.00 to cover the above fee.

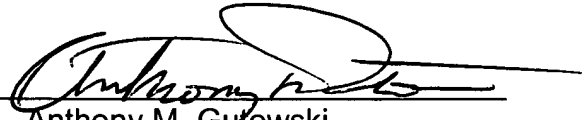
PETITION FOR EXTENSION. If any extension of time is necessary for the filing of this
Appeal Brief, and such extension has not otherwise been requested, such an extension

is hereby requested, and the Commissioner is authorized to charge necessary fees for such an extension to our Deposit Account No. 06-0916.

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: November 2, 2004

By:

A handwritten signature in black ink, appearing to read "Anthony M. Gutowski", written over a horizontal line.

Anthony M. Gutowski
Reg. No. 38,742



PATENT
Customer No. 22,852
Attorney Docket No. 05725.0875-00

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:)
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PATTERN AND METHOD OF APPLYING)
THE DECORATIVE PATTERN)

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

This is an appeal to the Board of Patent Appeals and Interferences ("the Board") from the final Office Action dated June 2, 2004 ("Final Office Action"), finally rejecting claims 1-15 and 25, in the above-referenced patent application. Pursuant to 37 C.F.R. § 41.37, Appellants submit one copy of this Appeal Brief (37 C.F.R. § 41.37(a)(1); Rules of Practice Before the Board of Patent Appeals and Interferences, 69 *Fed. Reg.* 49962 (Aug. 12, 2004) (to be codified at 37 C.F.R. Parts 1, 5, 10, 11 and 41)), accompanied by the fee (\$340.00) set forth in 37 C.F.R. § 41.20(b)(2).

A Notice of Appeal was filed on September 2, 2004, and this Appeal Brief is being timely filed within two months from the filing date of the Notice of Appeal under 37 C.F.R. § 41.31.

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I. **Real Party in Interest**

The real party in interest is L'Oréal S.A., the assignee of the entire right, title, and interest in the application, as indicated by assignment duly recorded in the U.S. Patent and Trademark Office at Real 012042, Frame 0785 on August 3, 2001.

II. Related Appeals and Interferences

Appellants, Appellants' legal representatives, and assignee are aware of no other appeals, interferences, or judicial proceedings that may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in this appeal.

III. Status of Claims

Claims 1-25 are pending in this application. Claims 16-24 have been withdrawn from consideration as being drawn to non-elected subject matter. Claims 1-15 and 25, as set forth in the Claims Appendix, have been finally rejected in the Final Office Action and the rejections applied to those claim are at issue in this appeal.

IV. Status of Amendments

An Amendment After Final under 37 C.F.R. § 1.116 was filed on September 2, 2004, concurrently with the filing of the Notice of Appeal, to place this application in better form for appeal. In particular, Appellants proposed amending the specification and drawings to cure all minor informalities asserted by the Examiner in the Final Office Action.

Although the Appellants' proposed amendments were Appellants' attempt to accommodate, and comply with, the Examiner's suggestions provided in the Final Office Action, the Examiner alleged that the proposed amendments raised the issue of new matter and refused to enter the amendments. See Advisory Action dated September 23, 2004.

No amendments have been filed subsequent or in response to the September 23, 2004 Advisory Action.

V. Summary of Claimed Subject Matter

A. Claims 1-13

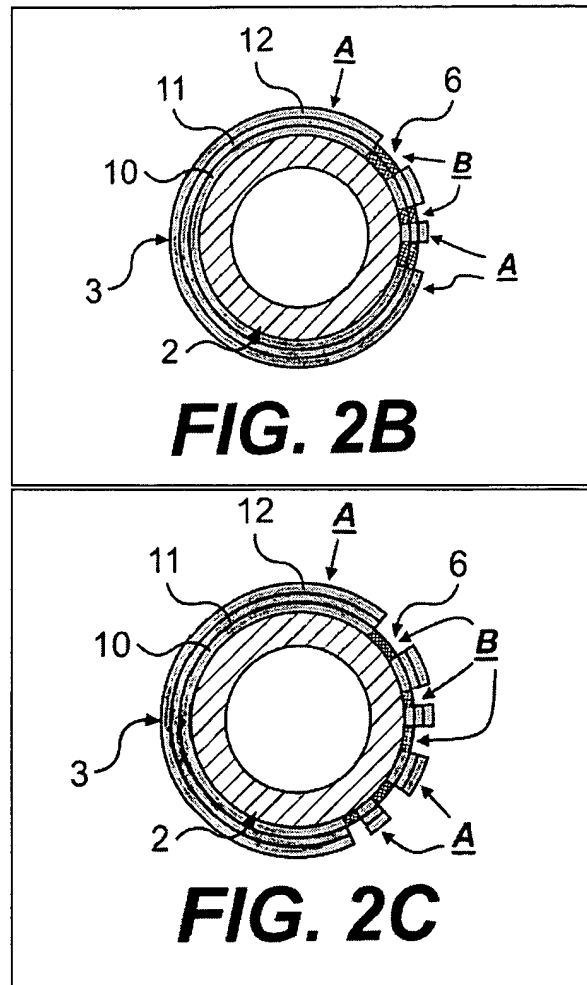
The subject matter set forth in claim 1 relates to an object including at least one decorative pattern. The object comprises a support, a first metallic coating, and a second metallic coating. According to an aspect of the invention, the support is formed of molded material. Page 3, paragraph [013], lines 1-3.¹

Figs. 1, 2A, and 2B schematically depict an example of a process that could be used to form an exemplary embodiment of an object (e.g., stopper). Page 8, paragraph [039], lines 1-2. Fig. 2A shows an initial form of an object 1 including a support 2 having three superposed layers thereon, i.e., a layer 10 of nickel, a layer 11 of copper, and a layer 12 of chromium. Page 10, paragraph [047]. By using, for example, a YAG-type laser, the object 1 is then decorated by literally “burning away” at least the outermost layer (i.e., the layer 12 of chromium) in the area corresponding to the decorative pattern 6. Pages 10-11, paragraph [048], lines 1-11. In an alternative embodiment, as shown in Fig. 2C, it is possible to eliminate the two outermost layers (i.e., layer 12 of chromium and layer 11 of copper), thus revealing the layer 10 of nickel. Page 11, paragraph [048], lines 11-13.

After the layer 12 of chromium is burned away (or both layers 12 and 11 are burned away), the object 1 comprises a first metallic coating covering at least part of a surface of the support 2, which at least partially delimits the decorative pattern 6, and a second metallic coating covering the surface of the support 2 in a region corresponding

¹ The references to the specification and drawings in this Brief are merely intended to facilitate explaining how the originally-filed application provides exemplary embodiments and exemplary disclosure relating to the claimed subject matter. Those references should not be construed as limiting the claims.

to the decorative pattern 6. Although not necessary, Appellants provide annotated Figs. 2B and 2C below to facilitate further explaining disclosed embodiments having first and second metallic coatings. For example, as illustrated in the annotated Fig. 2B and Fig. 2C, the first metallic coating (i.e., shaded portions designated with reference character "A") covers at least part of a surface 3 of the support 2, and at least partially delimits the decorative pattern 6. As also shown in annotated Figs. 2B and 2C, a second metallic coating (i.e., cross-hatched portions designated with reference character "B") covers the surface 3 of the support 2 in a region corresponding to the decorative pattern 6. Thus, in the embodiment of Fig. 2B, the first metallic coating A is formed of at



least three (e.g., n) superposed layers of metal (i.e., a layer 10 of nickel, a layer 11 of copper, and a layer 12 of chromium), and the second metallic coating B is formed of two (e.g., a maximum of n-1; at least one layer less than the first metallic coating) layers (i.e., a layer 10 of nickel and a layer 11 of copper). Page 3, paragraph [013], lines 3-7.

In the embodiment of Fig. 2C, the second metallic coating B covering the surface of the support in a region corresponding to the decorative pattern 6 includes only the

layer 10 of nickel, which differs from the layer 12 of chromium in color and/or appearance, thus resulting in the decorative pattern 6 on the object.

Referring to Figs. 2B and 2C, the object also includes an outer surface 3 facing away from the support. The outer surface 3 comprises the outer layer of the first metallic coating (i.e., layer 12 of chromium) and the outer layer of the second metallic coating (i.e., layer 11 of copper in Fig. 2B; layer 10 of nickel in Fig. 2C). Page 5, paragraph [019]; Figs. 1-6B. Further, the outer metallic layer of the first metallic coating has a color and/or an appearance differing from that of the outer metallic layer of the second metallic coating. Page 3, paragraph [013], lines 7-9.

According to an exemplary aspect, as set forth in claim 2, the molded material may be a material that can be metallically coated by electrodeposition or galvanoplasty. Page 4, paragraph [015], lines 1-4; page 8, paragraph [039], lines 2-3. For example, the molded material may be chosen from zamak, ABS (acrylonitrile butadiene styrene), PP (polypropylene), POM (polyoxymethylene) or a polyester, as set forth in claim 3. In some exemplary embodiments, the molded material may be filled, as set forth in claim 4. Page 4, paragraph [015], lines 4-6.

According to another exemplary aspect of the invention, as set forth in claim 5, the outer metallic layer of the first metallic coating may be formed of a first metal chosen from, for example, chromium, silver, gold and zinc. Page 4, paragraph [016], lines 1-2; page 6, paragraph [023], lines 1-2. The outer metallic layer of the second metallic coating may be formed of a second metal, differing from the first, the second metal being chosen from chromium, nickel, silver, gold, zinc, copper and an alloy, as set forth in claim 6. Page 4, paragraph [016], lines 2-4. In an exemplary embodiment, the

second metal may be an alloy comprising bronze, as set forth in claim 7. Page 4, paragraph [016], lines 2-4

In various exemplary aspects, the object may be configured in the form of a container or an accessory intended to be associated with a container, as set forth in claims 8 and 9, respectively. Page 4, paragraph [017], lines 1-4; Figs. 3-5. In an exemplary embodiment, the accessory may be a stopper for a container, as set forth in claim 10. Page 4, paragraph [017], lines 2-4; Fig. 3.

In some aspects, as set forth in claim 11, the object may be configured in the form of a stopper for a container intended, for example, to package a cosmetic product, and the stopper may have a transverse wall and a lateral skirt extending from the transverse wall. Page 5, paragraph [018], lines 1-3; Figs. 3 and 4. The decorative pattern may be formed on the transverse wall and/or on the lateral skirt. Page 5, paragraph [018], lines 3-4; Fig. 1 and 6A. In an exemplary embodiment, the lateral skirt may be a cylindrical skirt, and the decorative pattern 6 may be formed on the cylindrical skirt, as set forth in claim 12. Page 5, paragraph [018], lines 1-3; Figs. 1, 3, 4, and 5.

In some aspects, the at least n superposed layers of metal may be three (3) superposed layers of metal, as defined in claim 13. Page 3, paragraph [013], lines 3-7; Figs. 2A-C and 6B.

B. Claim 14

The subject matter set forth in claim 14 relates to a system comprising an object configured in the form of a container and a cosmetic product contained in the object. Page 4, paragraph [017], lines 1-4; page 5, paragraph [018], lines 1-2; page 11, paragraph [051], lines 1-6; Figs. 3, 4, 5.

C. Claim 15

The subject matter set forth in claim 15 relates to a system comprising a container containing a cosmetic product and an object configured in the form of an accessory intended to be associated with the container. Page 4, paragraph [017], lines 1-4; page 5, paragraph [018], lines 1-2; page 11, paragraph [051], lines 1-6; Figs. 3, 4, 5.

D. Claim 25

The subject matter set forth in independent claim 25 relates to an object including at least one decorative pattern. The object comprises a support formed of molded material (Page 3, paragraph [013], lines 1-3) and at least n superposed layers of metal covering at least part of a surface of the support, wherein $n \geq 2$. Page 3, paragraph [013], lines 3-5. The following discusses how the originally-filed application includes exemplary embodiments of the subject matter of claim 25.

At least an outermost metallic layer 12 of n layers 10, 11, 12 may be discontinuous so as to delimit a decorative pattern 6, as shown in Fig. 2B. In an alternative embodiment, two metallic layers (i.e., layer 11 and outermost layer 12) of the n layers 10, 11, 12 may be discontinuous so as to delimit a decorative pattern 6, as shown in Fig. 2C.

At least one layer (layers 10 and 11 in the exemplary embodiment shown in Fig. 2B; and layer 10 in the exemplary embodiment of Fig. 2C) of the n layers 10, 11, 12 may cover the surface of the support in a region corresponding to the decorative pattern 6. Page 3, paragraph [013], lines 5-6. The at least one layer may have a maximum of $n-1$ layers of the n layers. Page 3, paragraph [013], lines 5-7.

The object also includes an outer surface facing away from the support. The outer surface comprises an outermost metallic layer of the n layers (e.g., layer 12 of the shaded portion designated with reference character "A" in the Annotated Figs. 2B and 2C above) and a portion of an outermost metallic layer of the at least one layer (e.g., in the cross-hatched portion designated with reference character "B" in Annotated Figs. 2B and 2C above, see layer 11 in Fig. 2B and layer 10 in Fig. 2C). Page 5, paragraph [019]; Figs. 1-6B.

VI. Grounds of Rejection to be Reviewed on Appeal

Claims 1-15 and 25 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 1-3, 8-12, 14-15, and 25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,505,320 to Burns et al. ("Burns").

Claims 1-15 and 25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over German Patent Publication No. DE 3704403 to Mitsubishi Kinzoku K.K. ("Mitsubishi"), and German Patent Publication No. DE 3030403 to Rodi & Wienenberger AG ("Rodi"), and U.S. Patent No. 6,546,751 to Jaeger ("Jaeger").

VII. Argument

A. Rejection of claims 1-15 and 25 under 35 U.S.C. § 112, second paragraph, should be reversed because the claims particularly point out and distinctly claim the subject matter which Applicants regard as the invention

1. Claim 1

Appellants submit that claim 1 particularly points out and distinctly claims the subject matter which Appellants regard as the invention.

In the Final Office Action, the Examiner alleges that the term “partially delimiting” is unclear. Final Office Action at paragraph 5. More specifically, the Examiner alleges that “[i]t is unclear how a coating ‘partially delimits’ a decorative pattern.” Office Action dated October 23, 2003. Appellants disagree and submit that, contrary to the Examiner’s allegation, this claim language fully satisfies the requirements of 35 U.S.C. § 112, second paragraph.

Claim 1 recites a “first metallic coating at least partially delimiting a decorative pattern.” The term “delimiting,” which is a gerund form of the verb “delimit,” has a plain and ordinary meaning that would be clearly understood by one of ordinary skill in the art. For example, the term “delimit” is defined as “to establish the limits or boundaries of” in *The American Heritage College Dictionary*, 3rd ed., Houghton Mifflin Co., 1993. Thus, the phrase “first metallic coating at least partially delimiting a decorative pattern” plainly refers to the first metallic coating (and possibly also one or more other portions of the object) establishing the limits or boundaries of the decorative pattern.

Nevertheless, the Examiner alleges that “apparent confusion is a result of the specification failing to draw a nexus between the layers (6, 10, 11, 12) of figures 2A-2C and 6B and the first and second metallic coatings” (Final Office Action at paragraphs 12

and 18) and that “the claims and specification create significant ambiguity concerning the scope of the claims” (Final Office Action at paragraph 13). Appellants do not understand how these allegations are even relevant to alleged indefiniteness of “at least partially delimiting.” Regardless, Appellants submit that the Examiner’s “apparent confusion” is not “a result of the specification failing to draw a nexus between the layers and the first and second metallic coatings,” but instead appears to be a direct result of the Examiner’s erroneous interpretation of at least one recitation in claim 1.

A fundamental principle associated with 35 U.S.C. § 112, second paragraph, is that Applicants are entitled to be their own lexicographer and can therefore use whatever claim terminology they chose to define their invention. In particular, Applicants may use any style of expression or format in a claim which clearly identifies the subject matter boundaries for which protection is sought. As noted In re Swinehart, a claim may not be rejected solely because of the type of language used to define the subject matter for which patent protection is sought. 439 F.2d 210, 160 USPQ 226 (CCPA 1971). Moreover, “[s]ome latitude in the manner of expression . . . should be permitted” even if the claim language is not as precise as the Examiner might desire. M.P.E.P. § 2173.02. Furthermore, Applicants are entitled to present claims that have a scope broader than that of specific embodiments shown in the drawings of an application.

In the present case, Appellants chose to use the terms “first metallic coating,” “second metallic coating,” and “layer(s).” These terms are consistently used throughout the claims and specification and create no ambiguity concerning the scope of the claims. For example, as discussed above in the *Summary of Claimed Subject Matter*, the

specification contains terminology consistent with that of the claims, and the originally-filed specification and drawings disclose exemplary embodiments of the claimed subject matter. Therefore, the specification and claims provide a sufficient “nexus between the layers and the first/second metallic coatings” and, thus, create no ambiguity concerning the scope of the claims.

While the terms and expressions in the claims may not be what the Examiner would have selected, the claims should not be rejected solely for that reason, especially in the present case where one of ordinary skill in the art would understand the metes and bounds of the claims in light of the specification.

Accordingly, Appellants submit that the rejection of claim 1 under 35 U.S.C. § 112, second paragraph, should be reversed.

2. Claims 2-15

Regarding claims 2-15, the Examiner has not provided any reason for the rejection under 35 U.S.C. § 112, second paragraph. Appellants suspect that those claims were rejected by virtue of their dependency from independent claim 1.

Appellants submit that, since claim 1 is definite, the rejection of claims 2-15 under 35 U.S.C. § 112, second paragraph, should also be reversed.

3. Claim 25

Appellants submit that claim 25 particularly points out and distinctly claims the subject matter which Appellants regard as the invention.

In the Final Office Action, the Examiner alleges that, with regard to claim 25, “the term “partially delimiting” is unclear. Final Office Action at paragraph 5.

Appellants submit that claim 25 does not even mention the term “partially delimiting.” Nor does it recite the terms “first metallic coating” and “second metallic coating,” which the Examiner cited in the attempt at explaining the alleged indefiniteness of the claim.

Therefore, Appellants submit that the rejection of claim 25 under 35 U.S.C. § 112, second paragraph, is clearly erroneous and should be reversed.

B. Rejection of claims 1-3, 8-12, 14-15, and 25 under 35 U.S.C. § 102(b) should be reversed

1. Disclosure of Burns

Burns discloses a method for manufacturing an integrated circuit electronic package. The method includes blanket coating a first layer of a first material 2 onto a substrate 1, such as a polyimide or a fluorocarbon polymer. Burns, col. 2, lines 59-67; col. 3, lines 41-42. The first layer of a first material is preferably an electrically conductive metal, most preferably chromium. Burns, col. 3, lines 23-26. A layer of a second material 3 (most preferably copper) that differs from the first material is blanket coated onto the first layer 2. Burns, col. 3, lines 28-30, 41-42. A second layer 4 of the same material as the first layer 2 is blanket coated onto the layer 3. Burns, col. 3, lines 33-35, 41-42. Next, a layer of a dry imaging polymeric composition 5 is blanket coated on top of the second layer 4. Burns, col. 3, lines 43-45.

Next, layer 5 is subjected to laser ablation to provide a desired pattern, and the exposed portions of the second layer 4, and eventually layer 3, are removed via one or more wet etching processes. Burns, col. 3, line 51 to col. 4, line 18. Then, additional portions of the layer 5 of the dry imaging polymeric composition are subjected to laser ablation to provide a desired pattern. Burns, col. 4, lines 19-35. Finally, exposed

portions of second layer 4 and first layer 2 are removed via a wet etching step. Burns, col. 4, lines 39-45.

Completion of the aforesaid method results in an integrated circuit electronic package including the substrate 1 and the four layers 2, 3, 4, and 5 forming a pattern on the substrate 1. Referring to FIG. 6, an outer surface of the integrated circuit electronic package facing away from the substrate 1 includes an outer surface of the substrate 1 (i.e., where all of layers 2-5 were removed), an outer surface of layer 3 (i.e., where layers 4 and 5 were removed), and an outer surface of layer 5 (i.e., where no layers were removed). Therefore, the outer surface of the integrated circuit electronic package facing away from the substrate includes (1) a polyimide or a fluorocarbon polymer (i.e., substrate 1), (2) copper (i.e., layer 3), and (3) a dry imaging polymeric composition (i.e., layer 5).

2. Claims 1-3: Burns lacks any teaching of an outer surface facing away from a support, and the outer surface comprising an outer metallic layer of a first metallic coating and an outer metallic layer of a second metallic coating

In order for a claim to be anticipated by a prior art reference under 35 U.S.C. § 102, each and every element in the claim must be found, either expressly or inherently, in a single prior art reference. Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987); and the identical invention must be shown in as complete detail as is contained in the claim. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1929 (Fed. Cir. 1989). See also M.P.E.P. § 2131. As discussed below, Burns does not anticipate at least independent

claim 1 because it fails to disclose each and every element recited in independent claim 1.

For example, Burns fails to disclose or suggest, among other things, an object that includes an outer surface facing away from a support and comprising an outer metallic layer of a first metallic coating and an outer metallic layer of a second metallic coating, as recited in claim 1.

Instead, as discussed above in detail, Burns discloses an integrated circuit electronic package having an outer surface that faces away from the substrate 1, wherein the outer surface includes: (1) a polyimide or a fluorocarbon polymer (i.e., substrate 1); (2) copper (i.e., layer 3); and (3) a dry imaging polymeric composition (i.e., layer 5). Consequently, the outer surface of the integrated circuit electronic package that faces away from the substrate 1 includes only one outer metallic layer, that is, the layer 3 of copper. Therefore, the outer surface of the integrated circuit electronic package does not include outer metallic layers of first and second metallic coatings, as recited in claim 1.

Nevertheless, in the Final Office Action, the Examiner alleges that Burns discloses “a support having a first metallic coating of $n=2$ layers, designated 2 and 3, and a second metallic coating of $n-1$ layer, designated 4.” Final Office Action at paragraph 7. The Examiner further alleges that “the outer metallic layer (3) of the first metallic coating is Cu and has a color and appearance differing from that of the outer metallic layer of the second metallic coating of Cr.”

Contrary to the Examiner’s allegation, Appellants submit that the alleged “outer metallic layer of the second metallic coating of Cr” does not form any part of an outer

surface of the integrated circuit electronic package that faces away from the substrate. As shown in Fig. 6 of Burns, no part of the second layer 4 of chromium forms an outer surface of the integrated circuit electronic package that faces away from the substrate 1. Although the first and second layers 2, 4 of chromium each include an outwardly facing surface, these surfaces do not form any part of the outer surface of the integrated circuit electronic package.

Worth noting is that the Examiner may be relying on Fig. 5 of Burns when alleging that the “outer metallic layer of the second metallic coating of Cr” (i.e., the second layer 4 of chromium) forms a part of an outer surface of the integrated circuit electronic package that faces away from the substrate. Such reliance is improper because the electronic package shown in Fig. 5 is not a final product. Fig. 5 instead shows the package prior to subjecting it to wet etching processes that remove the exposed portions of the second layer 4 and the layer 3. Burns, col. 4, lines 39-45. Therefore, the Examiner’s possible reliance on Fig. 5 is erroneous and unsupportable.

For at least the reasons discussed above, Burns does not disclose or suggest an object that includes an outer surface facing away from a support and comprising an outer metallic layer of a first metallic coating and an outer metallic layer of a second metallic coating.

Accordingly, Appellants submit that the rejection of independent claim 1 under 35 U.S.C. § 102(b) is improper and erroneous. Therefore, the 35 U.S.C. § 102(b) rejection of claim 1 should be reversed. Claims 2 and 3 depend from independent claim 1 and, therefore, the rejection of claims 2 and 3 under 35 U.S.C. § 102(b) should also be reversed for at least the same reasons discussed above in connection with claim 1.

3. Claims 8-12, 14, and 15: Burns fails to disclose each and every element of claims 8-12, 14, and 15

Claims 8-12 each depend directly or indirectly from independent claim 1. As discussed above, claim 1 is patentable over Burns. Therefore, at least by virtue of their dependencies from claim 1, claims 8-12 should also be patentable over Burns.

In addition, the Examiner has failed to particularly point out where Burns has any alleged teaching of each and every element recited in claims 8-12.

Instead, the Examiner alleges that “[r]egarding claims 8-12 and 14-15, the shape of an object is a matter of personal preference predicated on ultimate intended use.” Final Office Action at paragraph 7. The Examiner further alleged that “[a]bsent an indication of unexpected results with respect to the shape of the object, no patentable distinction is seen.” In essence, the Examiner has completely disregarded the subject matter recited in claims 8-12, 14, and 15, and improperly attempted to shift her initial burden of establishing a *prima facie* case of unpatentability. Appellants disagree.

As an initial matter, Appellants do not understand the Examiner’s basis for alleging that all the subject matter defined in each of claims 8-12, 14, and 15 relates to a “shape of an object,” because the Examiner again has failed to provide any sufficient reasoning or explanation to support the allegation.

Regardless of what the Examiner’s reasoning was, Appellants submit that each of claims 8-12, 14, and 15 recites structural limitations that are distinguishable from the cited reference.

For example, claims 8 and 9 recite that the object is configured in the form of a container or an accessory intended to be associated with a container, respectively. In claim 10, the accessory is further defined as “a stopper for a container.” Claim 11

recites that “the object is configured in the form of a stopper for a container intended for packaging a cosmetic product” and that “the object further comprises a transverse wall and a lateral skirt extending from the transverse wall, wherein the decorative pattern is formed on at least one of the transverse wall and the lateral skirt.” In claim 12, the skirt is further defined as “a cylindrical skirt.” Claim 14 recites a system comprising the object of claim 8 and a cosmetic product contained in the object. Further, claim 15 recites a container containing a cosmetic product and the object of claim 9 on the container.

As is abundantly clear, each of claims 8-12, 14, and 15 recites one or more structural elements clearly not present in Burns. Since Burns merely relates to an integrated circuit electronic package, Burns lacks any teaching of the above-mentioned subject matter recited in claims 8-12, 14, and 15. Therefore, Burns does not anticipate the subject matter of claims 8-12, 14, and 15, and the rejection of those claims under 35 U.S.C. § 102(b) should be reversed.

4. Claim 25: Burns fails to disclose each and every element of claim 25

In the Final Office Action, the Examiner has again failed to particularly point out how Burns allegedly teaches each and every element recited in claim 25.

For example, in the Final Office Action, the Examiner alleges that Burns discloses “a support having a first metallic coating of n=2 layers, designated 2 and 3, and a second metallic coating of n-1 layer, designated 4.” Final Office Action at paragraph 7. The Examiner further alleges that “the outer metallic layer (3) of the first metallic coating is Cu and has a color and appearance differing from that of the outer metallic layer of the second metallic coating of Cr.” Appellants submit, however, that

claim 25 mentions neither a “first metallic coating” nor a “second metallic coating,” and, therefore, the Examiner’s allegation is inapplicable to the subject matter set forth in claim 25.

The subject matter set forth in claim 25 relates to an object comprising “at least n superposed layers of metal covering at least part of a surface of the support, wherein $n \geq 2$, at least an outermost metallic layer of the n layers being discontinuous so as to delimit a decorative pattern, wherein at least one layer of the n layers covers the surface of the support in a region corresponding to the decorative pattern.” The object further includes “an outer surface facing away from the support, the outer surface comprising the outermost metallic layer of the n layers and a portion of an outermost metallic layer of said at least one layer.” Since the at least n superposed layers are formed of metal, both the outermost metallic layer of the n layers and the at least one layer of the n layers must also be formed of metal.

Burns does not disclose, or otherwise suggest, “an outer surface facing away from the support, the outer surface comprising the outermost metallic layer of the n layers and a portion of an outermost metallic layer of said at least one layer.” Burns instead discloses an outer surface that includes only one outer metallic layer (i.e., layer 3 of copper).

In response to the Examiner’s allegation that “the outer metallic layer (3) of the first metallic coating is Cu and has a color and appearance differing from that of the outer metallic layer of the second metallic coating of Cr,” Appellants submit that the alleged “outer metallic layer of the second metallic coating of Cr” does not form any part of an outer surface of the integrated circuit electronic package that faces away from the

substrate. As shown in Fig. 6 of Burns, no part of the second layer 4 of chromium forms an outer surface of the integrated circuit electronic package that faces away from the substrate 1. Although the first and second layers 2, 4 of chromium each include an outwardly facing surface, these surfaces do not form any part of the outer surface of the integrated circuit electronic package.

For at least these reasons, Appellants submit that the rejection of independent claim 25 under 35 U.S.C. § 102(b) is improper and erroneous. Therefore, the 35 U.S.C. § 102(b) rejection of claim 25 should be reversed.

C. Rejection of claims 1-15 and 25 under 35 U.S.C. § 103(a) should be reversed because the Examiner has failed to establish a *prima facie* case of obviousness

1. Factual inquiries to determine obviousness

Several basic factual inquiries must be made in order to determine the obviousness or non-obviousness of claims of a patent application under 35 U.S.C. § 103. These factual inquiries, set forth in Graham v. John Deere Co., 383 U.S. 1, 17 (1966), require the Examiner to:

- (1) Determine the scope and content of the prior art;
- (2) Ascertain the differences between the prior art and the claims in issue;
- (3) Resolve the level of ordinary skill in the pertinent art; and
- (4) Evaluate evidence of secondary considerations.

The obviousness or nonobviousness of the claimed invention is then evaluated in view of the results of these inquiries. Id. at 17-18. In making this evaluation, the references must be considered as a whole, and must suggest the desirability and thus the obviousness of making the combination. See M.P.E.P. § 2141. The references

must also be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention. Id. Additionally, a reasonable expectation of success is the standard with which obviousness is determined. Id. Furthermore, the Examiner bears the initial burden of factually supporting a determination of obviousness in the rejection of the claimed invention. See M.P.E.P. § 2142.

Thus, in order to carry the initial burden of establishing a *prima facie* case of obviousness that satisfies the Graham standard, the Examiner must satisfy three basic criteria. First, the prior art references when combined must teach or suggest all the claim elements. Second, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Finally, there must be a reasonable expectation of success. See M.P.E.P. § 2143.

Further, the Federal Circuit has emphasized the high burden for establishing a *prima facie* case of obviousness and the requirement for specificity in the evidence necessary to support a *prima facie* case. For example, in In re Kotzab, the Federal Circuit held that “[e]ven where obviousness is based on a single prior art reference teaching all of the individual elements of the claims, there must be a showing of a suggestion or motivation to modify the teachings of that reference. In re Kotzab, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000). Whether this showing is based on an implicit or express showing in the reference, the Examiner “must provide particular findings related thereto.” Id. (citing In re Dembiczak, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999)(requiring a “clear and particular” suggestion to

combine or modify prior art references). In re Kotzab also notes the well known proposition that "broad conclusory statements standing alone are not 'evidence'." Id.

Additionally, in In re Lee, the Federal Circuit held that "[t]he factual inquiry whether to combine references must be thorough and searching. It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with." 277 F.3d 1338, 1342, 61 U.S.P.Q.2d 1430, 1433 (Fed. Cir. 2002). Further, it is "never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection is based." See M.P.E.P. § 2144.03.E; See In re Zurko, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693, 1697 (Fed. Cir. 2001); In re Ahlert, 424 F.2d 1088, 1092, 165 U.S.P.Q. 418, 421 (C.C.P.A. 1970).

Also, simply because references can be modified or combined is not sufficient basis to establish a *prima facie* case of obvious. In re Mills, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990); M.P.E.P. § 2143.01. And even if the claimed limitations are within the capabilities of one skilled in the art, such capabilities, by themselves, are not sufficient to establish a *prima facie* case of obviousness. In re Kotzab, 217 F.3d at 1370, 55 U.S.P.Q.2d at 1318; M.P.E.P. § 2143.01.

For the reasons set forth below, the Examiner has failed to meet the burden of establishing a *prima facie* case of obviousness.

2. Neither Mitsubishi nor Rodi establishes a *prima facie* case of obviousness under 35 U.S.C. § 103(a)

a. Mitsubishi and Rodi do not teach all of the claimed subject matter

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that the prior art references when combined teach or suggest all the claim elements. See M.P.E.P. § 2143.

In the Final Office Action, the Examiner alleges that each of Mitsubishi and Rodi teaches “molded substrates having decorative patterns formed thereon, the decorative patterns defined by at least two metals of contrasting colors.” Appellants disagree with the Examiner’s allegation and submit that neither Mitsubishi nor Rodi discloses, or otherwise suggests, “a support formed of a molded material,” as recited in each of claims 1 and 25.

Mitsubishi discloses a process for producing a composite metal plate for jewelry articles. The process includes welding a number of different metal sheets on top of one another to form a layered plate structure 10, as shown in Fig. 1. A groove 12 is then formed on one side of the layered plate structure 10 with the width of the groove 10 increasing from its bottom. The layered plate structure is then rolled to form a composite metal plate 14 with a striped pattern on at least one of its sides, as shown in Fig. 3. The Examiner appears to have alleged that some of the metal sheets of the layered plate structure 10 correspond to the recited “support.”

Without accepting this erroneous construction by the Examiner, Appellants submits, *arguendo*, that, even if some of the metal sheets were considered to

correspond to a support, there is no teaching or suggestion in Mitsubishi that any of those metal sheets are formed of a molded material.

Rodi discloses a watch strap consisting of a steel base material and a partial gold overlay. A decorative effect is achieved by applying gold and then subsequently removing parts of it. See Abstract of Rodi. The Examiner appears to have alleged that the steel base material corresponds to the recited "support." However, similar to the deficiency noted above with respect to Mitsubishi, there is no teaching or suggestion in Rodi that the base material is formed of a molded material.

For at least these reasons, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1 and 25 under 35 U.S.C. § 103(a) based on Mitsubishi or Rodi should be reversed.

Furthermore, with respect to dependent claims 2-15, the Examiner has failed to particularly point out where Mitsubishi and/or Rodi have any alleged any teaching or suggestion for each and every element recited in those claims. As the Federal Circuit has emphasized, it is "never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection is based." See In re Zurko, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693, 1697 (Fed. Cir. 2001).

Since the Examiner has failed to provide any evidentiary support for the rejection of dependent claims 2-15, the Examiner also has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a) with respect to

claims 2-15. Thus, the rejection of dependent claims 2-15 under 35 U.S.C. § 103(a) based on Mitsubishi or Rodi should also be reversed.

b. There is no suggestion or motivation in Mitsubishi or Rodi to modify their asserted teachings

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. See M.P.E.P. § 2143.

Even where an allegation of obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference. In re Kotzab, 217 F.3d 1365, 1370, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000). Whether this showing is based on an implicit or express showing in the reference, the Examiner “must provide particular findings related thereto.” Id. (citing In re Dembiczak, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999)(requiring a “clear and particular” suggestion to combine or modify prior art references). Moreover, “broad conclusory statements standing alone are not ‘evidence’.” Id.

In the present case, the Examiner has completely disregarded the above-discussed standard for establishing a *prima facie* case of obviousness, and has instead attempted to shift her initial burden to Appellants. For example, in the Final Office Action, while admitting that “the references may not specifically teach the number of claimed layers,” the Examiner alleges that “no patentable distinction is seen absent a showing of significance with respect to the additional layers of the first metallic coating.” As is abundantly clear from this statement, the Examiner did not even attempt to

provide any evidentiary support for her alleged findings of “no patentable distinction” or any motivation for modifying the alleged teachings of Mitsubishi or Rodi to supplement their deficiencies. Instead, the Examiner is merely attempting to shift her initial burden of establishing a *prima facie* case of obviousness by requiring Appellants to provide a “showing of significance with respect to the additional layers of the first metallic coating.” Such an attempt by the Examiner to shift her initial burden of proof is clearly erroneous and contrary to the well-settled precedents established by the Federal Circuit.

For at least these reasons alone, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1-15 and 25 under 35 U.S.C. § 103(a) based on Mitsubishi or Rodi should be reversed.

c. There is no reasonable expectation of success in Mitsubishi or Rodi

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is a reasonable expectation of success. See M.P.E.P. § 2143. In the Final Office Action, however, the Examiner is completely silent as to the reasonable expectation of success in modifying the asserted teachings of Mitsubishi or Rodi.

For at least this reason alone, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1-15 and 25 under 35 U.S.C. § 103(a) based on Mitsubishi or Rodi should be reversed.

3. Jaeger fails to establish a *prima facie* case of obviousness under 35 U.S.C. § 103(a)

a. Jaeger does not teach all of the claimed subject matter

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that the prior art references teach or suggest all the claim elements. See M.P.E.P. § 2143.

In the Final Office Action, the Examiner alleges that Jaeger teaches “molded substrates having decorative patterns formed thereon, the decorative patterns defined by at least two metals of contrasting colors.”

Appellants disagree with the Examiner’s allegation and submit that Jaeger does not disclose, or otherwise suggest, “a support formed of a molded material,” as recited in each of claims 1 and 25.

Jaeger discloses a glass candle stick holder 1 having “surface areas 3-6 of bare glass with a decorative pattern of shiny metal areas 7.” Jaeger, col. 3, lines 47-50. Jaeger, however, does not disclose or suggest that any part of the candle stick holder 1 is formed of a molded material.

Moreover, Jaeger does not teach or suggest that any of the shiny metal areas 7 have a different color and/or different appearance than other shiny metal areas 7. Therefore, Jaeger fails to teach or suggest, among other things, “an outer surface [...] comprising an outer metallic layer of [a] first metallic coating and an outer metallic layer of [a] second metallic coating, the outer metallic layer of the first metallic coating having at least one of a color and an appearance differing from that of the outer metallic layer of the second metallic coating,” as recited in claim 1, and an “outer surface comprising the outermost metallic layer of the n layers and a portion of an outermost metallic layer

of said at least one layer, the outermost metallic layer of the n layers having at least one of a color and an appearance differing from that of the outermost metallic layer of said at least one layer,” as recited in claim 25.

For at least these reasons alone, the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1 and 25 should be reversed.

Furthermore, with respect to dependent claims 2-15, the Examiner has failed to particularly point out where Jaeger has any alleged teaching or suggestion for each and every element recited in those claims. As the Federal Circuit has emphasized it is “never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection is based.” See In re Zurko, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693, 1697 (Fed. Cir. 2001).

Since the Examiner has failed to provide any evidentiary support for the rejection of dependent claims 2-15, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of dependent claims 2-15 under 35 U.S.C. § 103(a) based on Jaeger should also be reversed.

b. There is no suggestion or motivation in Jaeger to modify its asserted teachings

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. See M.P.E.P. § 2143.

As mentioned above in the discussion of the rejection based on Mitsubishi and Rodi, the Examiner has completely disregarded the standard for establishing a *prima facie* case of obviousness, and has instead improperly attempted to shift her initial burden to Appellants. Such an attempt by the Examiner is clearly erroneous and contrary to long-standing precedents of the Federal Circuit.

For at least these reasons alone, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1-15 and 25 under 35 U.S.C. § 103(a) based on Jaeger should be reversed.

c. There is no reasonable expectation of success in Jaeger

In order to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a), the Examiner must show that there is a reasonable expectation of success. See M.P.E.P. § 2143. In the Final Office Action, however, the Examiner is completely silent as to the reasonable expectation of success in modifying the asserted teachings of Jaeger.

For at least this reason, Appellants submit that the Examiner has failed to carry the initial burden of establishing a *prima facie* case of obviousness under 35 U.S.C. § 103(a). Thus, the rejection of independent claims 1-15 and 25 under 35 U.S.C. § 103(a) based on Jaeger should be reversed.

4. Summary

Appellants maintain that a *prima facie* case of obviousness under 35 U.S.C. § 103(a) has not been established by the Examiner. As discussed above, the Examiner

failed to provide sufficient evidence to show: (1) that each of the prior art references allegedly teaches or suggests all the claim elements; (2) that there is some alleged suggestion or motivation to modify the reference; and (3) that there is an alleged reasonable expectation of success. Accordingly, Appellants submit that the rejection of claims 1-15 and 25 under 35 U.S.C. § 103(a) should be reversed.

D. Conclusion


For the reasons given above, pending claims 1-15 and 25 are patentable over the cited prior art. The Board is therefore respectfully requested to reverse the outstanding rejections under 35 U.S.C. §§ 112, second paragraph, 102(b), and 103(a), so that claims 1-15 and 25 may be allowed.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are any fees due which are not enclosed herewith, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: November 2, 2004

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VIII. Claims Appendix

1. An object including at least one decorative pattern, the object comprising:
 - a support formed of molded material;
 - a first metallic coating covering at least part of a surface of the support, the first metallic coating being formed of at least n superposed layers of metal, wherein $n \geq 2$, the first metallic coating at least partially delimiting a decorative pattern; and
 - a second metallic coating covering the surface of the support in a region corresponding to the decorative pattern, the second metallic coating being formed of a maximum of $n-1$ layers of metal;wherein the object includes an outer surface facing away from the support, the outer surface comprising an outer metallic layer of the first metallic coating and an outer metallic layer of the second metallic coating, the outer metallic layer of the first metallic coating having at least one of a color and an appearance differing from that of the outer metallic layer of the second metallic coating.
2. An object according to claim 1, wherein the molded material is a material capable of being metallicity coated by at least one of electrodeposition and galvanoplasty.
3. An object according to claim 2, wherein the molded material is chosen from zamak, ABS (acrylonitrile butadiene styrene), PP (polypropylene), POM (polyoxymethylene) and a polyester.

4. An object according to claim 3, wherein the molded material is filled.
5. An object according to claim 1, wherein the outer metallic layer of the first metallic coating is formed of a first metal chosen from chromium, silver, gold and zinc.
6. An object according to claim 5, wherein the outer metallic layer of the second metallic coating is formed of a second metal, differing from the first, the second metal being chosen from chromium, nickel, silver, gold, zinc, copper and an alloy.
7. An object according to claim 6, wherein the second metal is an alloy comprising bronze.
8. An object according to claim 1, wherein the object is configured in the form of a container.
9. An object according to claim 1, wherein the object is configured in the form of an accessory intended to be associated with a container.
10. An object according to claim 9, wherein the accessory is a stopper for a container.
11. An object according to claim 1, wherein the object is configured in the form of a stopper for a container intended for packaging a cosmetic product, and wherein the

object further comprises a transverse wall and a lateral skirt extending from the transverse wall, wherein the decorative pattern is formed on at least one of the transverse wall and the lateral skirt.

12. An object according to claim 11, wherein the skirt is a cylindrical skirt, and wherein the decorative pattern is formed on the cylindrical skirt.

13. An object according to claim 1, wherein $n = 3$.

14. A system comprising:
the object of claim 8; and
a cosmetic product contained in the object.

15. A system comprising:
a container containing a cosmetic product; and
the object of claim 9 on the container.

25. An object including at least one decorative pattern, the object comprising:
a support formed of molded material; and
at least n superposed layers of metal covering at least part of a surface of the support, wherein $n \geq 2$, at least an outermost metallic layer of the n layers being discontinuous so as to delimit a decorative pattern,

wherein at least one layer of the n layers covers the surface of the support in a region corresponding to the decorative pattern, said at least one layer having a maximum of $n-1$ layers of the n layers, and

wherein the object includes an outer surface facing away from the support, the outer surface comprising the outermost metallic layer of the n layers and a portion of an outermost metallic layer of said at least one layer, the outermost metallic layer of the n layers having at least one of a color and an appearance differing from that of the outermost metallic layer of said at least one layer.

IX. Evidence Appendix

None

X. **Related Proceedings Appendix**

None